SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 3

MAURICE E. TRAVIS, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., SEPTEMBER 16, 1960

[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 6060

MAURICE E. TRAVIS, Appellant,

vs.

THE UNITED STATES OF AMERICA, Appellee.

STATEMENT OF POINTS RELIED UPON BY APPELLANT—
Filed December 17, 1958

Comes Now appellant, by his attorneys, and specifies the following points upon which he intends to rely:

1. The trial court erred in denying appellant's Motion for a New Trial.

2. The trial court erred in denying the said Motion for a New Trial without a hearing for the taking of evidence.

Respectfully submitted,

Attorneys for Appellant: Nathan Witt (E.D.), Eugene Deikman.

[fol. 2]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Pleas and proceedings before The Honorable William Lee Knous, Chief Judge of the United States District Court for the District of Colorado, and The Honorable Jean S. Breitenstein, Judge of the United States District Court for the District of Colorado, presiding in the following entitled cause:

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

MAURICE E. TRAVIS, Defendant.

No. 14,266, Civil.

MOTION FOR NEW TRIAL OR, IN THE ALTERNATIVE, FOR A HEARING ON SAID MOTION—Filed October 17, 1958

Pursuant to Rule 33 of the Federal Rules of Criminal Procedure, defendant, by his attorneys, moves for a new trial based on newly discovered evidence and in support thereof shows:

1. Defendant was convicted on February 5, 1958 on four counts of violating 18 U. S. Code, Section 1001, for filing false affidavits in 1951 and 1952 under Section 9 (h) of the Labor Management Relations Act, 1947. He was sentenced to imprisonment for eight years and fined $8,000.00.

2. On the trial, Fred Leonard Gardner was one of the three prosecution witnesses and his testimony was essential to support the judgment of conviction on each of the four counts.

3. Gardner took the witness stand on the trial herein on January 23, 1958 (R. 583).[1] On January 14, 15, and 16, 1958, Gardner had testified for the prosecution on the trial in United States v. West, et al. in the United States District Court for the Northern District of Ohio, Eastern Division, Criminal No. 22230 (R. 664).

[fol. 3] 4. Under cross-examination in the West case, Gardner testified that he had never been in the Armed Forces (West case, Typewritten Transcript of Trial Proceedings, p. 896). As a result of information secured after the trial in the West case that Gardner had served in the Army but had deserted, attorneys for defendants therein communicated with the Department of Justice and under

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[1] References in this form are to the Transcript of Record on appeal (Travis v. U. S., 10th Cir., No. 5879).

date of October 8, 1958, J. Walter Yeagley, Acting Assistant Attorney General, Internal Security Division, advised David Scribner, one of said attorneys, as follows:

> "Reference is made to this Division's letter to you dated September 12, 1958, concerning the case of United States v. West, et al. In that letter you were advised that we were making an appropriate inquiry to determine the accuracy or inaccuracy of the information you had received concerning certain testimony of Mr. Fred L. Gardner during his cross-examination in the West trial.
>
> "In response to our inquiry this Division has now been advised that Army service records of Fred L. Gardner, Army serial No. 6491727, reflect that Fred L. Gardner was born December 13, 1903 at Galena, South Dakota. He served in the United States Army from January 25, 1922 until he was discharged on May 30, 1925, at the expiration of his enlistment. During this period Gardner was absent without leave from February 14, 1924 until March 22, 1924. He was tried by court-martial and sentenced to be confined at hard labor for two months and to forfeit $20.00 a month salary for a like period.
>
> "Also according to Army service records, Fred L. Gardner, Army serial No. 6491727, re-enlisted in the Army on January 21, 1926. During this period Gardner was assigned to Fort Riley, Kansas. The records reflect that he deserted from there on May 11, 1926. There is no record that Gardner ever returned to the service. Records of the Department of the Army reflect that Gardner is not wanted at this time as a deserter."

5. Based on such newly discovered evidence, defendants in the West case filed a motion for a new trial under Rule 33 on October 16, 1958.

6. Although Mr. Yeagley's letter to Mr. Scribner states that Army service records reflect that Gardner was born on December 13, 1903, Gardner testified under cross-exami- [fol. 4] nation on the trial herein that he was born in 1906 and that "I have a birth certificate to bear it out" (R. 667).

7. The information contained in Mr. Yeagley's letter also indicates Gardner gave the following false information to the FBI which is contained in the statements furnished to defendant on the trial herein pursuant to 18 U.S.C.A., Section 3500 (Defendant's Ex. J for Identification):

a. that he was born on July 13, 1906;

b. that he had had no military service;

c. that he had been employed by Dupont Chemical, Niagara Falls, N.Y., from 1925 to 1929; and

d. that he had resided in Niagara Falls, N.Y., from 1925 to 1929.

If Gardner did make such false statements to the FBI, he is subject to prosecution for violation of Section 1001, the statute under which defendant was tried and convicted.

8. If the jury had known that Gardner was a deserter from the Armed Forces, that he had committed perjury in the West case, that he may have committed perjury on the trial herein, that he gave false information to the FBI which was then furnished to defendant on the trial herein, and that he himself had violated the very statute under which defendant was being tried, it is unlikely that the jury would have credited any of Gardner's testimony against defendant, especially in light of the following instruction given by the Court (R. 1222):

"You ladies and gentlemen, as jurors, are the sole judges of the credibility of the witnesses and the weight which is to be given the evidence that has been received in this case.

"In judging the credibility of the witnesses as reasonable men and women you may believe the whole or any part of the testimony of any witness or you may disbelieve the whole or any part of it. You should carefully scrutinize the testimony given and in so doing consider all the circumstances under which any witness has testified, his demeanor, and his manner while on the stand. Consider the witness's intelligence, the re-

[fol. 5] lation which he bears to the parties interested in the outcome of the action, his interest in the outcome of the case, and the manner in which he might be affected by the verdict, and the extent to which he is contradicted or corroborated by other evidence if at all. Consider such evidence as there may be relating to the reputation of the witness for truth and veracity. Consider each matter which tends reasonably to shed light on the credibility of a witness.

"A witness false in one part of his testimony is to be distrusted in other parts of his testimony. You may reject all or any part of the testimony of a witness who has wilfully testified falsely as to a material point."

9. Furthermore, it is apparent that since 1926, when he deserted from the Army, Gardner has been lying about his background for the same reason that he lied on the witness stand in the West case, on the trial herein, and with respect to the information he furnished to the FBI. He has obviously had to lie to his friends, his associates, his employers, and when necessary, to other agencies of the government, as, for example, when he registered for selective service in 1940, if register he did. A person who has thus spent his entire adult life in lying and concealing the truth is unworthy of belief and it would offend justice to permit a conviction obtained in part on the testimony of such a person to stand. Especially is this the case when such testimony, as here, consists of the uncorroborated admissions of defendant.

10. The newly discovered evidence also gives rise to questions concerning Gardner's motives for testifying for the prosecution, particularly whether he testified because of fear of prosecution or of exposure and in hope of immunity.

11. It is the duty of the government to advise this Court and defendant whether agents or attorneys of the Department of Justice had information that Gardner had deserted from the Armed Forces and that he had therefore committed perjury and made false statements as above set

forth. If is also the duty of the government to bring to the attention of the Court and defendant any other information in its possession or available to it which bears on Gardner's credibility, as, for example, whether he did register for selective service in 1940 and if so, whether he then disclosed the fact of his desertion from the Army in 1926.

[fol. 6] 12. Due diligence has been shown in obtaining the newly discovered evidence above set forth.

13. It is respectfully submitted, therefore, that this motion should be granted and a new trial ordered, or, in the alternative, that a hearing on the motion be held. Since an appeal from the judgment of conviction is now pending in the Court of Appeals, should this Court decide to order a new trial, defendant will seek to have the cause remanded to this Court pursuant to Rule 33.

Respectfully submitted,

Eugene Deikman, Nathan Witt, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER SETTING HEARING ON MOTION—October 21, 1958

This Matter having come on for the setting of the defendant's Motion for New Trial or, in the Alternative, for a hearing on said Motion, it is

Ordered that the defendant's Motion for New Trial or, in the Alternative, for a hearing on said Motion is set for hearing on Wednesday, October 29, 1958, at 9:30 a.m. o'clock in Court Room A, Post Office Building, Denver, Colorado.

Dated at Denver, Colorado, this 21st day of October, 1958.

By the Court:

William Lee Knous, Chief Judge.

[fol. 7]

IN UNITED STATES DISTRICT COURT

ORDER CONTINUING HEARING ON MOTION—October 22, 1958

This Mafter having been set for hearing on defendant's Motion for New Trial or, in the Alternative, for a hearing on said Motion, on October 29, 1958, and the defendant having requested a continuance to Friday, October 31, 1958, and the plaintiff having consented thereto, it is,

Ordered that the defendant's Motion for New Trial or, in the Alternative, for a hearing on said Motion set for hearing on Wednesday, October 29, 1958, be herewith continued to Friday, October 31, 1958, at 11:00 a.m.

Dated at Denver, Colorado, this twenty-second day of October, 1958.

By the Court:

William Lee Knous, Chief Judge.

IN UNITED STATES DISTRICT COURT

STATEMENT WITH REGARD TO KNOWLEDGE OF MILITARY SERVICE OF FRED LEONARD GARDNER—Filed October 31, 1958

Comes Now Donald E. Kelley, United States Attorney for the District of Colorado, and, with respect to paragraph numbered 11 of defendant's Motion for New Trial, herein, states for the information of the Court:

1) That none of the Government attorneys who prosecuted this case had any knowledge of any military service on the part of Government witness Fred Leonard Gardner prior to being informed of these facts by defense attorney Nathan Witt, by letter dated October 10, 1958;

2) That the Department of Justice, including the Federal Bureau of Investigation, also had no such knowledge and, pursuant to appropriate inquiry, first became aware of Gardner's military service from the Department of the Army records following receipt of letter dated Septem-

ber 10, 1958, from David Scribner, Esq., 15 William Street, New York, N.Y.

Donald E. Kelley, United States Attorney for the District of Colorado.

[fol. 8]

IN UNITED STATES DISTRICT COURT

LETTER AND REPLY—Filed October 31, 1958

160 West 77th Street
New York 24, N.Y.

October 9, 1958

E. I. DuPont DeNemours & Co. Buffalo Avenue and 26th Street, Niagara Falls, N.Y.

Gentlemen: I am trying to trace a person by the name of Fred Leonard Gardner who is supposed to have worked for you or your predecessor company Roessler and Hasslacher Chemical Company, as a punchpress operator from 1925 to 1929.

I would appreciate your advising me whether Mr. Gardner worked for you or the predecessor company at any time. If so, I would like the dates of his employment and his occupation.

Sincerely yours,

W:alp

Hal Witt

Mr. Hal Witt
160 West 77th Street
New York 24, New York

Dear Sir: Mr. Fred Leonard Gardner worked for the Roessler and Hasslacher Chemical Company from August 12, 1926 to February 16, 1928, as a handyman in our Cyanide Department.

R. H. Mort
Personnel Interviewer
Electrochemicals Department
E. I. duPont, Niagara Falls, N.Y.

IN UNITED STATES DISTRICT COURT

LETTER—Filed October 31, 1958

160 West 77 Street
New York 24, N.Y.

October 22, 1958

Morrisania Hospital, Walton Avenue and 168 Street, Bronx, New York

Attention: Personnel Department

Re: Fred Leonard Gardner

Gentlemen: I am trying to locate Fred Leonard Gardner, [fol. 9] who is supposed to have worked at your Hospital as an attendant during the period from 1930 to 1936, or perhaps a year or two earlier or a year or two later. 1930-6/14/34*

If you have records pertaining to Mr. Gardner, I should appreciate your advising me if he did work for you at or about such dates and, if so, what his occupation was.

Hospital Attendant*

If you also have his home addresses for the period during which he worked for you, I would appreciate having those also.

113 E. 168 St.*
169 E. 165 St.*
16 Elliott Pl.*
1224 Walton Ave. Bx*
1098 Gerard Ave. Bx*
(Last known address)*

I enclose a self-addressed, stamped envelope for your convenience.

Sincerely yours,

Hal Witt

*Handwritten notation
Enclosure

IN UNITED STATES DISTRICT COURT

MINUTE ORDER ON DEFENDANT'S MOTION FOR A NEW TRIAL OR, IN THE ALTERNATIVE, FOR A HEARING ON SAID MOTION—Entered October 31, 1958

This cause coming on for hearing before the Honorable William Lee Knous, Chief Judge of the United States District Court for the District of Colorado, on the Defendant's Motion For New Trial, Or, In The Alternative, For Hearing On Said Motion, And the Court having heard the statements and arguments of counsel, it is

Ordered that the United States Attorney draw the order in accordance with the ruling of the Court.

[fol. 10]

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR NEW TRIAL OR, IN THE ALTERNATIVE, FOR A HEARING ON SAID MOTION—Entered November 3, 1958

This matter coming on for hearing this 31st day of October, 1958, upon the motion of the defendant, Maurice E. Travis, for a new trial on the grounds of newly discovered evidence, or, in the alternative, for a hearing on said motion, the defendant appearing by his attorney, Nathan Witt, and the plaintiff appearing by Donald E. Kelley, United States Attorney for the District of Colorado, and the Court having examined the file herein and the plaintiff's response to the motion for new trial or, in the alternative, for a hearing on said motion, and having heard the arguments of counsel and being otherwise fully advised in the premises,

It Is Ordered that the motion for new trial on the grounds of newly discovered evidence or, in the alternative, for a hearing on said motion, be and the same is hereby denied.

William Lee Knous, Chief Judge, United States District Court.

In United States District Court

Notice of Appeal—Filed November 7, 1958

Maurice E. Travis, the appellant, resides at 3117 Ohio Street, Richmond, California.

His attorneys are Nathan Witt, address: P. O. Box 156, New York 23, New York; and Eugene Deikman, address: 600 Mile High Center, Denver 2, Colorado.

On February 5, 1958, after a jury trial, the appellant was found guilty on four counts of an indictment charging that appellant had violated Title 18, United States Code, Section 1001. The first count charged that in an "Affidavit of Noncommunist Union Officer" made on or about December 19, 1951, within the District of Colorado and filed with the National Labor Relations Board in the District of Columbia, the appellant falsely swore that he was not a member of the Communist Party. The second count charged that in the same affidavit he falsely swore that he [fol. 11] was not affiliated with the Communist Party. Count Four charged that on or about December 3, 1952, he falsely swore in a similarly made and filed affidavit that he was not a member of the Communist Party, and Count Five charged that in the same affidavit he falsely swore that he was not affiliated with the Communist Party. On March 28, 1958, a judgment of conviction was entered, and a sentence of four years imprisonment was imposed on each count, the sentences on Counts One and Two to run concurrently and the sentences on Counts Four and Five to run concurrently with each other but consecutively to the first two counts. In addition a fine of Two Thousand Dollars was imposed on each of Counts One and Four. The total sentence and fine was eight years imprisonment and Four Thousand Dollars. From the foregoing judgment and sentence an appeal was perfected to the United States Court of Appeals for the Tenth Circuit, which appeal is now pending in that Court under Number 5879 and styled "Maurice E. Travis, Appellant, vs. United States of America, Appellee," on the docket of that Court.

On October 17, 1958, a Motion for a New Trial or, in the alternative, For a Hearing on Said Motion, on the grounds

of newly discovered evidence was filed in this United States District Court in said original cause. On October 31, 1958, the District Court entered of record an Order denying appellant's Motion for a New Trial or, in the alternative, For a Hearing on Said Motion.

The appellant hereby appeals to the United States Court of Appeals for the Tenth Circuit from said Order denying said Motion for a New Trial or, in the alternative, For a Hearing on Said Motion.

Dated: November 7, 1958.

Attorneys for Appellant: Nathan Witt, Eugene Deikman.

[fol. 12]

IN UNITED STATES DISTRICT COURT

Transcript of Hearing on Motion for New Trial etc.— October 31, 1958

Proceedings had before Honorable William Lee Knous, Chief Judge, United States District Court, District of Colorado, on October 31, 1958, Courtroom A, Post Office Building, Denver, Colorado.

APPEARANCES: Honorable Donald E. Kelley, United States Attorney, District of Colorado; Paul C. Vincent, Esq., Special Attorney, Department of Justice; and Herbert G. Schoepke, Esq., Special Attorney, Department of Justice; appearing for the Government, Nathan Witt, Esq., Attorney at Law, New York, New York, and Eugene Deikman, Esq., Attorney at Law, Suite 600, Mile High Center, Denver, Colorado, appearing for the Defendant.

The Court: Do counsel in this case wish to proceed now, or do you want to come back? We might proceed for half an hour.

Mr. Witt: If it won't inconvenience your Honor, I would rather proceed now.

The Court: We will proceed now and run over the noon hour.

Mr. Kelley: I would like to file this at this time (handing document to Court and counsel).

The Court: You better offer it for the record; there won't be anything in the record. Does Mr. Witt know about this? Just now Mr. Kelley handed me a paper that he said he wanted to submit, and I suggested that he state for the record if Mr. Witt had a copy.

Mr. Kelley: Your Honor, this is a statement in response to a challenge in the motion of the defendants in reference to the knowledge of Government attorneys as to the Army service of the witness Gardner, and primarily submitted for the information of the Court; however, we can have it marked and offer it as an exhibit.

The Court: I think it can just be filed; it is just in the nature of a response to the motion, I gather, isn't it?

Mr. Kelley: Just in response to one sort of charge of bad [fol. 13] faith on the part of the Government.

The Court: I think it can just be marked "filed." You have given Mr. Witt a copy of it?

Mr. Kelley: Yes.

Mr. Witt: Yes.

The Court: You can mark it filed. All right, you may proceed, Mr. Witt.

ARGUMENT BY MR. WITT

Mr. Witt: May it please the Court, this is a motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure, based on newly discovered evidence, the motion having been filed on October 17th. The motion alleges that Fred Leonard Gardner, one of the three witnesses against the defendant on trial, had deserted from the United States Army in 1926, that on the witness stand in the West case, the conspiracy case in Cleveland, with which your Honor is familiar, and in response to a question he testified that he had never been in the armed forces, and that in connection with the trial in this case he had given the FBI in Butte, Montana false information relating to that matter—the matter of his desertion—and to other related matters, particularly again stating that he had seen no military service, and stating that he had

worked in Niagara Falls, New York at a time inconsistent with the time of his military service; and also he had falsified or apparently had falsified the date of his birth.

The motion sets forth a letter from J. Walter Yeagley, the acting Assistant Attorney General in charge of the Internal Security Division, setting forth the basic factual material, to wit, that records of the Army show that Gardner was in the Army beginning in 1922; that during his first enlistment he was AWOL for a short period and was punished for that, and that he deserted in May of 1926 during the course of his second enlistment.

The motion also sets forth that it is the responsibility of the Government to advise this Court and the defendant as to what Government agents, FBI agents, and Government attorneys who had to do with the West case and this case knew about these facts relating to Gardner's history, indicating that he had committed perjury in the West case and that he had apparently violated Section [fol. 14] 1001 in the Travis case, the very criminal statute under which Travis himself was indicted and convicted.

This document which was just handed to the Court and to me, your Honor, before this argument began, is apparently a statement signed by Mr. Kelley to the effect that none of the Government attorneys and no one else connected with the Department of Justice had knowledge about Gardner's military service, and before the matter was brought to the attention of the Department of Justice in a letter from David Scribner, one of the attorneys in the West case, in September of 1958.

Your Honor, as I understand what is before us this morning, your Honor is considering not only the matter of granting or denying this motion for new trial on its face, but your Honor was also considering whether to conduct a hearing on the motion for the taking of evidence before your Honor grants or denies the motion.

It is our position that this motion on its face warrants an order by your Honor granting a new trial, but that in any event that Your Honor should not deny the motion without first conducting a hearing for the taking of evidence, and I will address myself to this latter point first.

I take it, your Honor, that there is no longer any dispute, although there seems to be some doubt about it when this motion first came to your Honor's attention, I take it now there is no longer any dispute that your Honor has the power on a motion of this kind to conduct a hearing for the taking of evidence. If there were cases in this circuit which I haven't submitted to your Honor yet or to the Government establishing the propriety of that procedure—

The Court: I think that's true.

Mr. Witt: Yes. Now, passing that question and getting to the issues: As to the necessity of a hearing. First—I will come back to the argument that this motion on its face calls for an order granting a new trial; but, I will pass that and address myself first to the question of a hearing for the taking of evidence.

In that connection, your Honor, since this motion was [fol. 15] filed certain other facts have come to our attention as a result of a continuing investigation which I and my associates have been conducting, an investigation relating to Gardner, an investigation that was opened up by these facts relating to his history and particularly his desertion from the Army in 1926, and at this time I would like to submit that material with this apology to the Court. As your Honor knows, one of the requirements in connection with a motion of this kind is that the defense showed due diligence in making the motion, and consequently we hasten to file the motion as soon as we got word of Mr. Yeagley's letter, as the motion itself recites.

Since that time we have been working with our limited resources trying to secure other material about Gardner relating to facts and relating to those aspects of his biography which have been opened up by this newly discovered evidence. In that connection earlier this week I sent Mr. Kelley a copy of a letter from the duPont Company in Niagara Falls, New York, and at this time I ask leave to submit a photostatic copy of that letter as an exhibit in support of the motion and in support of the argument I am making.

The Court: I think they can be filed just like the matter Mr. Kelley submitted this morning.

Mr. Witt: Yes, I am submitting it now, your Honor, so I can refer to it in connection with this argument. I have

the original in my hand, your Honor, and I handed your Honor a photostatic copy. Your Honor will recall that in the FBI material that was submitted to the defense on the trial under Section 3500 it was recited that Gardner worked for duPont Chemical in Niagara Falls, New York as a punchpress operator during a period from 1925 to 1929. On the trial that was Defendant's Exhibit J for identification, if the Court please.

Following the receipt of this letter from Mr. Yeagley, since the facts contained in that letter were inconsistent with the statement in the FBI report about Gardner's employment during that period in Niagara Falls, I had my son and clerk, Hal Witt, write a letter to the duPont Company in Niagara Falls inquiring about Gardner's employment, and the duPont Company through R. H. Mort, its personnel interviewer, replied on the same letter which he had written, the original which I have and the photostat of which I sent Mr. Kelley earlier this week, and [fol. 16] a copy of which I just handed to your Honor; and your Honor will note that the duPont Company advises us as follows:

> "Mr. Fred Leonard Gardner worked for the Roessler and Hasslacher Chemical Company from August 12, 1926 to February 16, 1928, as a handyman in our cyanide department."

In connection with that information I myself went to Moody's Industrial Manual—this is for 1958—to find the history of that company and the history of duPont, and at page 1,381, Moody's Industrial Manual for 1958, it states that duPont took this Roessler and Hasslacher over in 1930 and merged it into itself in 1932, so that in fact during that period from 1926 to 1928 when Gardner worked in Niagara Falls he worked for the Roessler and Hasslacher Chemical Company and not as he advised the FBI apparently that he had worked for duPont Chemical.

You will notice several other errors or lies that Gardner told in his statements to the FBI. First and most important is the discrepancy in the dates. Gardner, as we have seen, told the FBI that he worked for duPont in Niagara

Falls from 1925 to 1929. On the other hand, the records of the company show actually that he worked for the predecessor company from August 26th to February 28th. Certainly this material shows that Gardner said he was living in Niagara Falls as well as the employment history of Gardner in this FBI material—his former residences are also given in the same exhibit—and that also shows, according to Gardner, that he lived in Niagara Falls from 1925 to 1929, and, of course, this material from Mr. Yeagley and this letter from duPont shows that Gardner lied about his residence during that period.

Obviously he was in the Army during that period beginning in 1922 through 1925 until May of 1926. Finally, and perhaps most significant to my mind, although it seems a detail, is the fact that even when Gardner told the FBI what his employment had been he lied or was mistaken about that, having told the FBI that he worked as a punch-press operator, when in fact, according to this letter from duPont, he worked as a handyman. I say that is perhaps most significant because it is a detail that throws light on this man's attitude towards the truth and towards facts. So much for that aspect of the problem in further support of the motion.

[fol. 17] Yesterday, if the Court please, just before I left New York to come to Denver in connection with this argument, I received a letter from the Morrisania Hospital in Bronx, New York, relating to Gardner's employment there. Your Honor will recall in the same FBI document, the same exhibit, that Gardner told the FBI that he worked at that hospital in the Bronx as an attendant from February, 1930 to June, 1936, and your Honor will see in a moment why I emphasize the months, February, 1930 to June, 1936. I followed the same procedure, if the Court please, in connection with trying to get the facts from duPont in this case.

I had my son and clerk write a letter to the hospital after we had inquired by telephone and been advised that if we wrote them a letter they would give us the facts relating to Gardner's employment. I am handing Mr. Kelley a photostatic copy of that, and I am handing one to your Honor, if the Court please. Here again, like in the case

of duPont, the hospital sent us its reply on the same letter we had written, as your Honor will observe.

The Court: I think we better stay with matters that are alleged in the motion. This is really embarking into a hearing, and that is one thing we are to determine. This situation isn't mentioned in your motion at all, is it?

Mr. Witt: Your Honor, I am submitting it in this connection; perhaps I didn't make myself plain. I know there is a procedural problem and I really owe the Court an apology, and I tried to explain why we had no alternative except to do it this way.

The Court: Our primary question here is as you indicated very clearly in your statement: No. 1, whether the allegations contained here in the motion, whether the Court is warranted or required to have a hearing with respect to the matters alleged in the motion; or secondly, whether the motion of itself states a ground to justify such an examination, or for a new trial. This is bringing into this thing something that isn't even involved in the motion.

Mr. Witt: May I explain what I have in mind, your Honor? Perhaps your Honor is correct. I am now submitting this, and this is the only other document of its kind that I have, in support of this argument that the motion [fol. 18] warrants a hearing for the taking of evidence. Now, this could have been submitted in affidavit; in fact, under the rules there is nothing to stop us now from submitting this material in affidavit form.

The Court: Except that it isn't mentioned in your motion.

Mr. Witt: Yes, but, your Honor, the only reason—as I tried to explain—is the question of the time difficulties we have been operating under, and I think your Honor is entitled to consider up to this date, up to any time your Honor acts on the motion, any material supporting the allegations. We say in the motion, your Honor, that the newly discovered evidence opens up the possibility that Gardner has continued to tell lies ever since he deserted from the Army, and this further supports that allegation; and, in other words, further supports the argument that if your Honor is not disposed to grant the motion on its

face, your Honor should give serious consideration to conducting a hearing for the taking of evidence.

Now, just to finish off on this, if I may—

The Court: All right, you may.

Mr. Witt: I was about to say that Gardner's information to the FBI not only stated that he worked for the hospital from June, 1930—from February, 1930 to June, 1936, but also stated in connection with his residences that from 1930 until about November, 1937 that he lived in an apartment house at 1127 Sherman Avenue, Bronx, New York.

Now, this information from the hospital advises us that Gardner worked there from 1930—they don't give the month, as your Honor will see—until June 14, 1934, which is inconsistent with the dates Gardner gave, and also gives us five different residence addresses for Gardner during the period he worked for the hospital, no one of which is the residence address he gave to the FBI on Sherman Avenue, so with respect to both these items, your Honor, the item relating to his employment in Niagara Falls and the item relating to his employment in the hospital, we say, as I said a moment ago, that it either supports the motion or supports our argument that a hearing for the taking of evidence should be conducted.

Now, getting to the legal issues involved, your Honor, as [fol. 19] I read the Government's cases, a list of which I received yesterday, but I have had an opportunity to research them, not having had an opportunity to read the memorandum that was handed to me just before I rose to argue, your Honor, but I assume the memorandum is based on the cases which the Government submitted to us this week, and as I read those cases, your Honor, in this situation none of them are in point, except the two Supreme Court cases which they cite after we had given them to them and to your Honor earlier, and this is the heart of the legal issue in this case, as I see it, your Honor.

Practically all the cases that the Government cites, all the cases, and some fairly new ones, like the Martin case and the Larrison case, and a whole string of oft-cited cases, the Government cites those, as I understand it, for the proposition that a new trial on the ground of newly discovered evidence will not be granted if the newly discovered evidence is—and I use the phrase that is used most often

in these cases—if the newly discovered evidence is merely impeaching.

Now, we say we have no quarrel with those older cases; but, we say that that doctrine, the doctrine of those cases, that expression of the rule is not applicable in this case, because the newly discovered evidence in this case is not merely impeaching. The newly discovered evidence in this case goes to the very basis of Gardner's credibility. The undisputed evidence—leaving aside this new material I referred to a few minutes ago—the undisputed evidence which comes from the Department of Justice itself shows that Gardner was a deserter, a fact that we could scarcely have known at the time of the trial; that he perjured himself in the West case, and that he has apparently violated the same criminal statute which the defendant was convicted of violating.

This newly discovered evidence demonstrates that Gardner was a person who is unworthy of credence altogether, a person who—to put it in lay terms—could not be believed on a stack of Bibles, even when he is talking about where he lived fifteen or twenty years ago, where he worked and when he worked, and so forth and so on, and we allege in the motion that if this thing were further developed that it would show that at least since 1926 Gardner has lied, has had to lie all over the place.

It is obvious that Gardner has had to lie in connection [fol. 20] with every job he obtained since 1926. This new material at least shows that Gardner has failed to account to the FBI and to us in the 3500 statements for the two-year period between 1928 and 1930, which he tried to cover up by saying that he worked in Niagara Falls during that time. Gardner failed to account for the two-year period from 1934 to 1936, which he tried to cover up by stating that he worked for the hospital from 1930 to 1936, when he worked only until 1934.

We say under the cases—aside from those that the Government cites—this is an exceptional situation that doesn't fall within cases like the Martin case and the Larrison case. Even before the two recent Supreme Court cases, the Communist Party case in 351 U.S., there were cases which dealt differently with this kind of a situation than with

the usual situation where the newly discovered evidence can be called merely impeaching.

I refer particularly to the Segelman case, one of the cases which we gave your Honor and the Government, in 83 Fed. Supp., and the Senft case in 274 Fed. at 629. The Segelman case, your Honor, is particularly in point and it is a case which distinguishes cases like the Martin case and the Larrison case. The Segelman case is a case in which at the time of trial the prosecution witness had been convicted of perjury, not in connection with the case in which he was testifying, but an entirely unrelated matter, and the Court refused to permit the defense to show it.

The Court: You observed, of course, in that case that one of the reasons the new trial was granted was because where a witness had been convicted of perjury the Court had to instruct especially on that point. That could never attend in this case unless the witness is subsequently convicted of perjury. What is your observation about that one?

Mr. Witt: Let me say about that—I didn't mean to take time this morning—but, that offers up a very interesting aspect of that case. I should in that connection advise your Honor, as I already have advised Mr. Kelley, that I took the liberty earlier this week after my return to New York of writing to the United States Attorney in Butte, directing his attention to the apparent violation by Gardner of Section 1001, and it is precisely because of the Segelman case and the problem your Honor has just raised that I wrote that letter to the U. S. Attorney in Butte, because it seems to [fol. 21] me that if Gardner has violated 1001 that he, like any other law violator, should be prosecuted; but, aside from that in connection with our responsibility in this case, under the Segelman case it will become important to us if Gardner is prosecuted under 1001 in Butte.

Apart from that, your Honor, there is the obvious problem in the West case. It seems to me that isn't our case, although what has happened there, of course, is of the greatest importance to us here; but, it seems to me that it is the responsibility of the U. S. Attorney in Cleveland where Gardner committed his perjury on the witness stand,

to prosecute Gardner for perjury in that jurisdiction, and if Gardner is convicted either in Butte or in Cleveland or in both places, it seems to me that it would be open to us under the Segelman case to come back to this Court to ask for a new trial on the basis of those developments; but, all we can do now, your Honor, we have to take the situation as we find it; and since the prosecution of this man for his apparent violations of Federal Law is in the hands of the Department of Justice, we say that we are in the situation where the Segelman case does apply.

Whatever one could say about the West case, which in a technical sense isn't ours, it seems very plain to me, especially in view of this additional evidence relating to Gardner from Niagara Falls and from the Bronx, that Gardner violated 1001 in Butte, Montana and should be prosecuted.

In any event, leaving that aside, your Honor, the significance of the Segelman case otherwise is that that case holds, despite the long line of cases of the Martin, Larrison type, that when you are dealing with a question of perjury by a witness, even if the perjury was not in connection with the case itself, was in connection with an entirely unrelated matter, the defendant is entitled to a new trial. I won't take time on the case, but I take it your Honor is familiar with that and the Government is. It is slightly different, but the basic principle is just the same. Also, this Miller case, which I won't take time on. I gave your Honor and the prosecution that citation, 61 Fed. Supp., and it supports us.

Now, I want to say a final word on the two Supreme Court decisions and come back to the question of a hearing. [fol. 22] The Court: I think we probably better recess now. It is 12:20, and I have a matter set at 1:30. Of course, this calendar was set before this motion was continued, which I understand will take but a very few minutes, so I think we better recess until 1:45.

Mr. Witt: Yes, sir.

Mr. Kelley: Your Honor, I would just like to hand up our memorandum which we have already previously given to counsel.

The Court: Very well; you may announce a recess of the Court until 1:30 and a recess in this matter until 1:45.

(Whereupon, the proceedings were adjourned at 12:22 o'clock p.m., October 31, 1958.)

2:10 p.m. Proceedings Oct. 31, 1958

The Court: We will proceed with the arguments in Case No. 14266. You may proceed, Mr. Witt.

Mr. Witt: May it please the Court, I think I was about to say a few words about the two Supreme Court cases which seemed to us to be very much in point, the Communist Party case and the Mesarosh case. If the Court please, as I read those cases it seems to me they represent a fundamental departure or a fundamental development on this entire subject. In both those cases the witnesses in question, three of them in the Communist Party case and one of them in the Mesarosh case, had committed perjury or had apparently committed perjury or testified falsely in other proceedings, and proceedings other than those involved, other than the Communist Party case, and the Mesarosh case.

If we were to take what is said in the older cases, as I call them in the Larrison and Martin line of cases, literally, then in neither of these cases would new hearing, as in the Communist Party case, or new trial, as in the Mesarosh case, have been warranted. But, the Court in those cases declared the doctrine that if a witness is tainted, if he is a person who is unworthy of credibility, even if that appears by testimony or by other material elsewhere outside of the particular case, then his testimony in the particular case must be discarded and not given any credit whatsoever.

[fol. 23] So the old rules about materiality, for example, don't apply, obviously. The old rules about new evidence that is merely impeaching don't apply, and what becomes important in the case of a witness whose credibility is in question, whose fundamental credibility, whose capacity to tell the truth is attacked, then the defendant is entitled to a new trial.

Actually, if the Court please, as I read the older cases, that doctrine declared in those two cases isn't really new. It seems to me implicit in cases like the Segelman case and the Senft case and the Miller case, and even, your Honor, if you read the opinions in Martin and Larrison and Johnson in the Seventh Circuit, which the Government also cites, if you read those carefully you will find hidden away in them implicit in them is this doctrine which the Supreme Court brought out into the open in these two recent and important cases. I will probably have more to say on the subject, if your Honor will permit me in rebuttal to the Government after I hear the Government's argument; but, with that I would like to leave those cases, that problem, and get again, if I may, to the question of the necessity of a hearing for the taking of evidence in this case, unless your Honor is disposed to grant the motion on its face.

Why do we think that a hearing is called for here? We think a hearing is called for here because it seems to us that this newly discovered evidence, including the new material which I presented this morning, merely scratches the surface as far as Gardner is concerned. We allege in our motion that it would seem plain from his original dereliction in 1926 and the necessity for lying and deception that that imposed upon him ever since, opens up the possibility of showing that this man cannot be believed on any subject, and especially—and this, it seems to us, goes to the very heart of this motion—and especially when he is testifying as he did in this case, with respect to two conversations with the defendant at which nobody else was present except in one of them Gardner's family was present at Travis' home. That's the one in June of 1953.

I have in mind the Opper case and the Smith case in the Supreme Court, your Honor, Opper in 348 U.S., dealing with uncorroborated admissions. Here this man testified to two uncorroborated conversations with the defendant, and his testimony, despite the fact that the Government in its memorandum says that his direct testimony covers only a few pages, your Honor having presided on the trial [fol. 24] will, I am sure, agree with me when I say his testimony about those two conversations on the trial was

of the utmost importance. In fact, especially in view of the strength of the argument, as I see it, that we have on the insufficiency of the evidence, it is quite plain to me that without Gardner's testimony about those two conversations the case probably wouldn't have been strong enough to go the jury.

A host of questions suggest themselves about this man's capacity for telling the truth. I adverted to several of those this morning. Why has he covered up what he was doing between 1928 and 1930? Why has he covered up what he was doing between 1934 and 1936? Why does he seem to be under the necessity of lying to the FBI, not only about where he was and when he was there, but about what he was doing there, as in the case of his Niagara Falls experience and the case of his work for the hospital in the Bronx? You get a person like that and I don't see how anybody could argue that he is worthy of belief when years later he takes the witness stand to testify as to what he told a particular man and what the particular man told him.

In the motion we refer to the fact that in connection with his registration for selective service in 1940 he must have run into some difficulty. I think it was in October, 1940 that the universal registration took place. There are only two possibilities as I see it in that connection: One, that this man, because he would have had to reveal his Army record and the fact of his desertion, didn't register at all, or, if he did register, deciding not to run the risk of committing a felony by failing to register, he must have lied about his Army service. That was one of the questions that was asked, as we all know, in connection with registration, as it is today; so that this man was caught on the horns of a dilemma. We don't know the answer to that: we have tried to get the answer. I would like to state that to the Court, but without a subpoena and without a hearing we can't get the answer.

In that connection we submit that it is the responsibility of the Government to get the answer to that question as well as a good many other questions about this man.

Then another category altogether, your Honor, of course, there is no dispute about the fact that in cross examining a

witness you are entitled to know whether he is giving his testimony under the fear of prosecution or exposure or in [fol. 25] the hope of immunity. If we had a hearing and Gardner was a witness, aside from who else might be a witness, we could inquire into that subject. It didn't occur to us to inquire on the trial, because not having known about his desertion from the Army and these lies that he has told over the years and the trouble he might have been in with the Federal Government, we had no basis for such an inquiry, so a hearing would enable us to go into all that, and we say it appears from what we already have that we would be able to prove by a hearing up to the hilt that this man has continuously lived a life of lies and deception since at least 1926.

In this connection, your Honor, may I remind your Honor about some of the things that were brought out in the trial that seemed rather unimportant and minor at the time, but in the light of this newly discovered evidence now assumes great importance, raising the question as to whether or not this man is even capable of telling the truth.

Your Honor will recall that when I cross examined him about statements he had made to the FBI, because I had a basis for impeaching him on the basis of those statements, on several occasions he said the material contained in the FBI report was wrong, that he hadn't given that information to the FBI about his marriage and divorce, which may, as your Honor suggested on the trial, have been a typographical error in the report, so I will pass that one.

Again your Honor will remember that when I questioned him about his elementary school education, because he had told the FBI according to its report that he had had seven years of elementary school education, while we had his testimony before the Senate Subcommittee in 1952 that he had had two years, and he reconciled that contradiction by saying that the FBI got that wrong. Then your Honor will recall that the FBI report stated that Gardner had told them that he had worked for Union Carbide as an official from late '49 to September, 1950, a period of at least nine months, and since that was inconsistent with what he had testified to either in the West

case or before Senator Watkins in 1952, I queried him about that, and his answer to that was that the FBI got it wrong.

As I say, if the Court please, at the time these items didn't seem too important, but now like these other items [fol. 26] with respect to where he worked and when and the jobs he held and all the rest of it, these items assume great importance. I have searched in my own mind as to some rational explanation as to why in terms of this man's original dereliction and the necessity he was under of covering it up, why he would misinform the FBI about where he had worked and how long for Union Carbide and in what position; because I am ready to assume, as I think you probably are, your Honor, that the FBI didn't make any mistake about that. It is hard for me to see how the FBI could put into writing a statement based on conversations by FBI agents with this man, would put in Union Carbide as an official—

The Court: That was all argued to the jury at the time of the trial and that evidence was all admitted in evidence that you are talking about.

Mr. Witt: Your Honor, perhaps I am not— These things were argued to the jury in one context and they weren't all argued to the jury, because of their relative unimportance, but, your Honor, on this new trial motion in light of the newly discovered evidence, what I am now saying to your Honor is that these things have to be seen, these discrepancies, these mistakes, lies, perjuries, whatever you want to call them, have to be seen in another context, and I say that particularly in light of the Mesarosh case where the Solicitor General himself came forward and told the Supreme Court of the United States that the Government had no confidence in this man who had testified in that case, because they had discovered that he had lied elsewhere. At least, I say, it is the responsibility of the Government to come forward and give us a satisfactory answer to these questions, and finally I come to that point.

As I think I said this morning, we want a hearing in order to develop evidence as to the allegation in the motion concerning the duty and the responsibility of the Government with respect to this matter. In response to that Mr. Kelley handed us this morning what is called a statement

with regard to knowledge of military service of Fred Leonard Gardner, in which Mr. Kelley states that no Government attorneys or FBI agents knew about that, and therefore none of them knew about his perjury in the West case and about his lies to the FBI in Butte.

Well, your Honor, under the cases in terms of what I think we are entitled to, this piece of paper isn't sufficient. [fol. 27] I don't think that even an affidavit from Mr. Kelley with these statements would be sufficient. I added up in preparation for this argument the number of FBI agents and attorneys whom Gardner talked to during the period between the summer of 1955 and the time he took the witness stand here early in '58 in connection with Travis, Mine-Mill, the West case or other matters. You remember when we interrogated Gardner about those conversations in connection with Section 3500, and Gardner apparently talked to at least five FBI agents and five attorneys before he took the witness stand in this case, and we think we are entitled to interrogate all those agents and all those attorneys as to their relations with Gardner, and particularly whether they knew that Gardner was a deserter, and as a consequence whether they knew that Gardner testified falsely in the West case and violated Section 1001 in the Travis case.

Finally, even if I am wrong in what I deduce from the Communist Party and Mesarosh cases, your Honor, it seems to me that the prosecution here owes the Court and owes the defendant more of a responsibility in connection with this matter than it is prepared to assume. There is very little doubt in my mind that if this newly discovered evidence had been developed in connection with a defense witness, the Government would be making the most thoroughgoing investigation, as the Government did in the Jencks case when we came up with Matusow's recantation. The Government had its agents active all over the country. It empanelled several grand juries in several districts in order to investigate every possible aspect of the Jencks case and Matusow's recantation. As far as I can tell—and what I am about to say is supported by the fact that Mr. Kelley has done nothing but produce this so-called statement—since the motion for new trial was filed in the

West case and since this motion for new trial was filed in this case, the Government has sat on its hands with respect to this man Gardner, and now if I read their memorandum correctly in light of their statement of Mr. Kelley's, they come in and ask this Court to forget about it; that this man Gardner may have perjured himself in the West case, and he may have violated 1001 in this case, and he may have told a stack of other lies for the last thirty-odd years; but, let's forget about it; Travis was convicted; let him remain convicted.

I submit that the Supreme Court, and the two cases, the Communist Party case and the Mesarosh case and a whole line of cases going way back to the Mooney case, down to [fol. 28] the Alcorta case in the last term of the Supreme Court, the Supreme Court has tried to make it clear to prosecutors that they owe the federal courts and defendants in federal courts much more of the responsibility than that. Thank you, your Honor.

ARGUMENT BY MR. KELLEY

Mr. Kelley: May it please the Court, while the subject of the statement which the Government filed is fresh in the Court's mind, I want to make this further statement in connection with the filing of it, and that is that as a responsible federal employee or agent I made that statement. I think it is complete, and the Government is willing to rest on that statement. Whether Mr. Witt feels that it satisfies him or not is not of particular concern to me.

Now, to show the Court that the Department of Justice acts up to its responsibilities, the Mesarosh case which has been referred to here frequently is the result of the action of the Solicitor General in filing a motion in the Supreme Court while the matter was pending on appeal, pointing up the possibility of perjury of a witness in the trial of that case, and if we felt that such action was justified here that type of action would be taken.

Now, this man Travis was indicted four years ago sometime in the fall of 1954. He was first tried three years ago by a jury of twelve citizens of this community, and he was convicted. The case was reversed solely on the ground of an improper question to a character witness on

cross examination. He was again convicted by another jury of twelve citizens of this community, and the case is now pending on appeal. In neither trial has there been one iota of testimony to the effect the defendant was not a member of the Communist Party at the time he signed the non-Communist affidavits alleged in the indictment.

Now the defendant comes before this Court and asks for a new trial on the ground of alleged perjury committed in a wholly different proceeding. The alleged perjury relates to a matter that was even collateral in the case in which it occurred, if such it was, and it is not even in this case; so on the face of the motion the Court would be justified in denying not only the hearing but the motion for new trial.

Now, I use the term "alleged perjury" advisedly, your Honor. We admit that the record shows a question put to [fol. 29] him at Cleveland in the negative. The question was: "You have never been in the armed forces?" to which he answered, "No." That is a double negative; it is possible that he was denying the statement which counsel had made to him. Now, we concede that Gardner entered the Army on two different occasions. The records of the Department of the Army show that, but until Gardner is given a chance in the West case to explain that, if the Court there feels that it is of sufficient materiality, I am not going to concede or accuse Mr. Gardner of having wilfully lied at all. We don't know whether the reporter correctly got the question or the answer; we don't know whether Gardner correctly understood the question. Those are questions that might be important to the Court in the West case. It is collateral not only to this case—it is not even in this case—and it is wholly unrelated to the issues in the Travis case.

Now, Travis admitted in a statement which was introduced in evidence here without even objection that he was a member of the Communist Party until August of 1949. There was no evidence of any kind that he changed that status, and the presumption is that the status continued. Travis associated with many people in his union and in Communist Party activities. No one came forward to contradict anything Gardner said, nor for that matter, any-

thing that Eckert or Mason said, or the witnesses that testified in the first trial. There is no fact in issue in the Travis case which is controverted.

I wholeheartedly believe in holding the prosecution to high standards of integrity, and I think I would be just as quick to condemn the use of perjured testimony to convict as would Mr. Witt. I do not believe it possible where human beings have to be employed as witnesses, prosecutors, and, yes, even defense attorneys, that you can attain perfection. If the rule Mr. Witt is contending for were adopted by the courts, every conviction in the country could be reversed; especially would this be true where reports are furnished under Section 3500. It would mean that there would have to be a perfect understanding between the questioner—that is, the FBI—and the witness, and that the FBI would report the information obtained without a single error. It would leave no room for estimates or faulty or slightly inaccurate recollections in connection with dates or places, and we all know that memories are not infallible. Who has the infallibility of discernment to determine which of two versions of any event are accurate?

[fol. 30] We have heard six different witnesses in the two trials describe the events, the activities and action of Travis relating to the Communist Party and Communism. It was all consistent and the testimony of Gardner was consistent with that of Eckert and Mason, and Eckert and Mason were the other two witnesses in this last trial. Nothing is raised either in the argument or in the motion to cast any doubt as to the substantial accuracy of Gardner's testimony, and I can urge the Court with a clear conscience and with full recognition of my obligation as a representative of the United States to deny the motion. I can think of nothing less flimsy in the realm of reasoning than to grant a new trial because of an allegedly false statement on a collateral matter in a wholly unrelated case, and that is what the Court has been asked to do.

Now, Mr. Witt has demanded that Mr. Gardner be prosecuted in Montana on 1001 for having told the FBI he had no military record, and possibly for some of these other misstatements. In the first place, the statute requires that the statement has to be made in a matter which is within

the jurisdiction of an agency or department of the Government, and this Court with Judge Pickett sitting has held that these matters which the FBI investigates that arose in other agencies are not matters within the FBI's jurisdiction. And another thing which is true both as to 1001 and as to perjury is that the statements have to be material to the investigation. Mr. Witt brought out on cross examination of Gardner during this trial that the FBI was investigating Mine-Mill and Gardner's Communist Party activities and other matters. They weren't investigating when he was born, what grade he went to in school, where he worked twenty-five or thirty years ago, so those matters are wholly immaterial, and I think it is a fair comment to say that when he was asked about some of these dates, for instance, when he had worked at the hospital, or when he had worked at this plant in Niagara Falls, that he made estimates of when it was.

Unless a person kept accurate records it would be very difficult to tell exactly what you were doing, especially where you have shifted around as Mr. Gardner has from one union to another, from one job to another.

In the Communist Party case the majority opinion at page 123 said this:

> "In considering this non-Constitutional issue raised [fol. 31] by denial of petitioner's motion, we must avoid any intimation with respect to other issues raised by petitioner. We do not so intimate by concluding that the testimony of a witness against whom the uncontested charge of perjury was made was not inconsequential in relation to the issues on which the Board had to pass."

In other words, the pe jury had to be not inconsequential, and had to relate to the issues on which the Board passed. Again on page 124 of this same opinion:

> "If these witnesses in fact committed perjury in testifying in other cases on subject matter substantially like that of their testimony in the present proceedings, their testimony in this proceeding is inevitably discredited and the Board's determination must take that into account."

Now, the testimony relating to military service in the West case didn't relate to the issues of that case, and there was no testimony in the Travis case at all about the military service.

In Mesarosh the Supreme Court upon the Government's representations—not the defendant's—found that Mazzei's credibility had been wholly discredited. There certainly is nothing on the fact of this motion or suggested by counsel that would wholly discredit the witness Gardner.

I think this is important language from the Mesarosh decision, on page 9, and this I say is important because of the distinction that Mr. Witt attempts to make between old decisions and the new thinking which is represented by Mesarosh and the Communist Party cases. This is the language of the Court:

> "It must be remembered that we are not dealing here with a motion for a new trial initiated by the defense, under Rule 33 of the Federal Rules of Criminal Procedure, presenting untruthful statements by a Government witness subsequent to the trial as newly discovered evidence affecting his credibility at the trial."

Now, note this language, your Honor:

> "Such an allegation by the defense ordinarily will not [fol. 32] support a motion for a new trial, because new evidence which is merely cumulative or impeaching is not, according to the often-repeated statement of the courts, an adequate basis for the grant of a new trial."

Then the Court cites a number of the so-called old cases. Now, in determining whether or not to grant a new trial on the grounds of newly discovered evidence under Rule 33, which is what we are under, federal courts have used either of two recognized tests. The first was originally laid down in the case of Bary vs. State, 10 Ga. 511 at page

572, which required a party seeking a new trial on the ground of newly discovered evidence to show the following vital elements:

> "(a) The evidence must be in fact newly discovered; that is, discovered since the trial. (b) Facts must be alleged from which the Court may infer diligence on the part of the movant. (c) The evidence relied on must not be merely cumulative or impeaching. (d) It must be material to the issues involved, and (e) it must be of such nature as that on a new trial the newly discovered evidence would probably produce an acquittal."

The other test was developed in the case of Larrison vs. United States, 24 F. 2d 82, Seventh Circuit case, wherein the following three requirements were specified:

> "(a) the court is reasonably well satisfied that the testimony given by a material witness is false.
>
> "(b) That without it the jury might have reached a different conclusion.
>
> "(c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial."

We have cited in our brief a number of cases, and from the discussion this morning I presume the Court is familiar with most of these cases.

In United States vs. Johnson, 142 F.2d 588 and at 591 the Court explained the distinction between and the applicability of the two rules, pointing out that the Larrison rule is applicable where there has been a recantation or [fol. 33] where it has been proven that false testimony was given at the trial, neither of which we have here. Obviously, the Larrison rule has no applicability in the instant motion since there is no question of false testimony or recantation in this case; however, even in those cases where false testimony was given on the trial, the law is well

settled that unless the false testimony relates to a material issue, a new trial should be denied.

In United States vs. Derosier, a District Court case for the Western District of Pennsylvania, defendants sought a new trial alleging inter alia proof of false testimony of a Government witness by legal Court documents. The Court denied the motion for a new trial, although the testimony of the Government witness did in fact conflict with court records, and held that it would merely tend to impeach the credibility of the Government's witness. The Court said:

> "Ordinarily, newly discovered evidence which goes to the impeachment of a witness and not to facts at issue in the case is not sufficient ground for a new trial."

This basic principle of denying motions for a new trial based upon newly discovered evidence which is merely cumulative, impeaching, or seeks to destroy the credibility of a witness has been frequently stated by the courts.

It is well settled that the matter of granting a new trial based on after-discovered evidence rests in the sound discretion of the trial court, and an order refusing a new trial on that ground would not be disturbed on that appeal in the absence of a plain abuse of discretion.

Now, your Honor, I want to refer to 327 U.S. 106 which the Supreme Court cited or referred to when it was talking about this not being a Rule 33 case. This is the opinion in United States vs. Johnson, which will be found in the footnotes of the Mesarosh case:

"This extraordinary length of time"—they are talking about the old rules where they gave them sixty days after judgment, and in the event of an appeal at any time before disposition by the appellate court as time within which a motion for new trial based upon newly discovered evidence could be filed—and the Court had this to say:

> [fol. 34] "It is obvious, however, that this privilege might lend itself for use as a method of delaying enforcement of just sentences. Especially is this true where delay is extended by appeals lacking in merit.

This case well illustrates this possibility. While a defendant should be afforded the full benefit of this type of rectifying motion, courts should be on the alert to see that the privilege of its use is not abused. One of the most effective methods of preventing this abuse is for appellate courts to refrain from reviewing findings of fact which have evidence to support them. The circuit court of appeals was right in the first instance, when it declared that it did not sit to try de novo motions for a new trial. It was wrong in the second instance when it did review the facts de novo and order the judgment set aside."

This is one of the so-called old cases, but the Supreme Court in the case which Mr. Witt relies upon cited it with approval. I think, your Honor, that there is nothing on the face of this motion nor in any statements made by counsel that would justify setting aside this conviction and the judgment of the Court in going through all of this another time.

Mr. Witt: I think I would probably save everybody's time if you gave me a few minutes to look over my notes and cut everything down.

The Court: We will have a fifteen minute recess.

(Recess taken.)

The Court: You may proceed, Mr. Witt.

FURTHER ARGUMENT BY MR. WITT

Mr. Witt: May it please the Court, I think it may be well to put to one side two or three quite irrelevant statements that Mr. Kelley made, first with respect to the so-called statement which Mr. Kelley filed this morning. He said that whether it satisfies me or not is of no concern to him. Well, it is not a question of satisfying me, your Honor, or satisfying Mr. Kelley; it is just a question of satisfying what the rules of law are, and all I can do is repeat what I tried to say earlier: As I understand the cases, and particularly the position of the Supreme Court with respect to the responsibility of the prosecution in a situation of this kind, I don't think the prosecution is taking

the correct position. I don't think it is going far enough with this so-called statement.

[fol. 35] Also, I think we can put to one side Mr. Kelley's statements about the two trials, the length of time that has been consumed, and the fact that there are other witnesses against Travis. That again is the kind of argument that prosecutors are in the habit of making when they are confronted with a problem of this kind, having to do with a fair trial, their position comes down to saying, "Well, this might have been unfair, maybe this man Gardner is a liar or psychopathic but let's forget it. Travis is guilty. It has taken a long time; let's go ahead."

That's not the way I read the Constitution or read the cases. Another matter that I would just like to touch on and pass, and that is Mr. Kelley's reference to what I understood was the Loughlin case, when he referred to Judge Pickett's opinion in this court. I doubt that if Mr. Kelley were on the other side of the issue he would seek to support that opinion of Judge Pickett's. Anyway, I am familiar with it. I am reasonably familiar with the cases under 1001, and I think Judge Pickett's opinion in that case states doubtful law; but, it is immaterial whether Judge Pickett in the Loughlin case was right or not, because the issue here as to whether or not Gardner violated 1001 in Butte when he gave the false statements to the FBI depends upon the answer to the second point that Mr. Kelley made, and that is whether the statements were material.

Mr. Kelley in passing touched on the question of jurisdiction under 1001. Well, there can't be any question but that the FBI had jurisdiction, and this matter of getting Gardner's statements about other people as well as about his own history was a matter within the jurisdiction of the FBI.

As to materiality, I don't think there can be any question about that either, because I should imagine Mr. Kelley would agree that when the FBI is talking to a person who may be a witness in one or more important cases the FBI is quite concerned with getting correct information for use in those cases, and the fact that the information secured from Gardner in Butte was used in the

Travis case in these 3500 statements is itself proof that everything contained in those statements was material, so I think 1001 was satisfied.

[fol. 36] Now, I just want to come to one other factual thing and then make two points. First, I want to answer what Mr. Kelley had to say about Gardner's testimony in the West case about his military service. I am not sure I followed Mr. Kelley; but, if I did follow him correctly I think I understood him to say that Gardner may have not understood the question or the question may have contained a double negative, and that in fact the reporter who took the answer on it, transcribed that, may have made a mistake; so in fact, even if a statement by Gardner on the witness stand that he had never seen military service was perjury, still that is no real proof that Gardner ever said any such thing. The trouble with that argument is that Mr. Kelley has overlooked entirely the fact that the statement furnished us by the FBI included a similar answer. This is again Defendant's Exhibit J for identification, and under the heading "military service" the answer is, "none," the same answer that the transcript shows that Gardner gave on the witness stand in West; so I think whatever Mr. Kelley had to say about that is beside the point. He overlooked this statement in the FBI report which we were furnished, so Mr. Kelley is wrong about that.

Now, in passing I want to take this opportunity to refer to a remark made in the Government's memorandum in the same connection. The Government argues in the memorandum that although Gardner gave this answer under cross examination in the West case he wasn't even asked the question on cross examination in the Travis case; that is, the question about his military service. Well, there is a simple answer to that, your Honor. We had this FBI statement to the effect that he had no military service, and there was therefore no reason for cross examining him about it. We didn't know at the time about his desertion, of course, and your Honor will have observed and will remember from the trial that I cross examined him only when I had a prior inconsistent statement of his, so I cross examined him about the year of his birth because

he had told Senator Watkins he had been born in 1907, when he told the FBI and he said on the witness stand here he was born in 1906, and in passing in that connection, the Army records show that he told the Army that it was 1903, so I asked him about that matter, relatively unimportant though it was, because I was trying to build up a record to show this man never makes consistent statements about any single fact in his history.

[fol. 37] In any event, that's why we didn't ask him, and if we didn't ask him, and if we didn't then if the Government thinks we should have asked him whether he had seen military service, the answer to that is that we were misled by Gardner's violation of 1001 when he told the FBI in Butte that he had seen no military service.

Now, in the same connection, Mr. Kelley, if I followed him, made an argument in confession and avoidance. He said that we referred to these several inaccuracies in this material relating to Gardner, but after all, you can't expect a man to keep accurate records about where he worked and where he lived. Well, that misstates and misreads what this case is about, if the Court please. Here we are dealing with a man who as I said a moment ago, and as the record shows, doesn't give consistent answers about when he was born. On one occasion it is 1903; on another occasion years later it is 1907, and then a few years later it becomes 1906, and I won't repeat everything else that I tried to develop this morning; the record shows that, and that we referred to in the motion indicating that whatever this man says has been subject to objective proof we have found that he is either lying or has made inconsistent statements, and we have a record now of about twenty or twenty-five such illustrations at least, aside from the possibility which I referred to already of a whole series of lies.

The important point about this argument of Mr. Kelley's, if the Court please, is that we are talking about a witness who gave testimony about two conversations, one which had taken place more than six years before, and one which had taken place more than four years before. He testified as to what he said to Travis and what Travis said to him in the fall of 1951. He testified as to what he said to Travis and what Travis said to him in June of 1953, and

I submit if Mr. Kelley admits that this man Gardner is mistaken about all these other items which are subject to objective proof, because a man can't be expected to remember such things, as for example, the year of his birth, and can't be expected to keep accurate records, as if people go around keeping records of their birth so that when they are asked they have to say, "Just let me check my records." I say if we are talking about that kind of a man then what kind of credence can we give testimony about what he said to Travis and what Travis said to him back in 1951 and 1953?

[fol. 38] Now, coming to two points as a matter of law, if the Court please: In the first place, Mr. Kelley says that what we are dealing with now on our representation is a collateral matter in a wholly unrelated case, meaning the alleged perjury, I take it, in the West case. No. 1, we are dealing with a crime which is much like perjury. It is often called perjury, the crime of violating 1001, and if there is any doubt as to whether what this man said on the witness stand in West was technical perjury, there can't be the slightest doubt that what this man told the FBI in Butte was technically a gross violation of Section 1001, and that was in this case, because what he told the FBI in Butte didn't remain in the FBI files in Butte. It was transcribed and given to the defense in this case for use in the defense of Travis pursuant to the new law, Section 3500, so we are not dealing with a collateral matter in a wholly unrelated case.

We are dealing with a question of a man who has lied over and over and over again in connection with this case, and in that connection the Government's memorandum says in our motion we don't point out where he may have committed perjury in this case. Well, just in passing we thought it was so obvious we didn't have to spell it out in the motion; but, again I remind your Honor and the prosecutors that this man said on the witness stand here that he was born in 1906, when the records of the Army show he was born in 1903. Now, it could be, and the reason we said in our motion he may have committed perjury, because it could be that he told the truth on the witness stand here when he said 1906 and that he lied when he

nlisted in the Army in 1922; but, we have no way of nowing that.

In any event, when he told Senator Watkins that he was orn in 1907 he was obviously lying there or lying when e enlisted in the Army, or lying on the witness stand ere; but, anyway, that's the reason why we say he may ave committed perjury in this case.

Now, finally coming to the Mesarosh and Johnson cases: 'irst, and again in passing, Mr. Kelley is mistaken when e advised the Court a few minutes ago that the Solicitor eneral in the Mesarosh case pointed out to the Supreme ourt the possibility of perjury in the Mesarosh case. Ir. Kelley is mistaken. Here is 352 U. S. at page 8 where ie Court refers to that problem. After summarizing what ie Supreme Court advised the Court about Mazzei's lies nd possible perjuries elsewhere, the Court goes on to say is at page 8:

> [fol. 39] "At the oral argument, however, the Solicitor General stated that although he believed all of this testimony to be untrue, he was not prepared to say the witness Mazzei was guilty of perjury in giving the testimony; that his untrue statements might have been caused by a psychiatric condition, and that such condition might have arisen subsequent to the time of this trial."

So the problem there was entirely different. The Solici- or General didn't know the answer, but at least the So- citor General did not take the position that there may ave been perjury by Mazzei in the Mesarosh case. All e did was point out that he had said these extraordinary nd flamboyant things elsewhere under oath and not under ath, and therefore the whole matter should be looked to.

But, be that as it may, getting to the real point of the esarosh case in terms of Mr. Kelley's presentation, to e, your Honor, in terms of what I call the old cases, ie most significant thing in the Mesarosh case, aside from s basic philosophy which I tried to express earlier, will found in footnote four on page nine, 352 U.S., the same

footnote Mr. Kelley referred to where the Court cites the Johnson case and the Rutkin case and several others, and I refer particularly to the last sentence of that footnote which appears on page ten after the Chief Justice cites the Johnson case and these other cases he says as follows:

> "But see United States v. On Lee, 201 F. 2d 722, 725-726 (dissenting opinion)."

And why do I say that I think that is perhaps the most significant thing in that opinion in relation to the motion which is presently before your Honor? That's because that dissenting opinion, the one in the On Lee case, as your Honor may recall, was a dissenting opinion in that famous narcotics case which went to the Supreme Court later, went to the Supreme Court earlier, and it came up again before the Circuit Court for the Second Circuit on a motion for new trial because of evidence of credibility, evidence relating to the credibility of the chief prosecution witness, and the issue in that case was much the same as the case before your Honor, although the circumstances were entirely different, and what Judge Frank did in his dissenting opinion in that case, as I read it, your Honor, the Supreme [fol. 40] Court adopted in the Communist Party and the Mesarosh cases, because Judge Frank argued that when you are dealing with a witness whose credibility has been completely destroyed or undermined, these old rules about being merely impeaching or cumulative, et cetera, et cetera, which Mr. Kelley referred to, become irrelevant, and I think the fact that the Chief Justice in that footnote uses the signal for that citation "But see" to my mind has very considerable significance aside from, as I have said, what I think the philosophy of the opinion itself is.

Finally, I think Mr. Kelley overlooked perhaps the most significant thing in the Johnson case in Mr. Justice Black's opinion. Mr. Kelley was concerned with convincing your Honor that since Travis was indicted in 1954 we should hurry along with this and get Travis in jail as soon as we can, and therefore read you that part of Mr. Justice Black's opinion dealing with delays and abuse of this pro-

cedure; but, actually the more important point in the case dealt with the basis on which a new trial should be ordered, and actually Mr. Justice Black was concerned in having appellate courts substitute their own judgment on disputed questions of fact on new trial motions for that of the district judges, and the sentence on top of page 111—this is 327 U.S.—makes that quite clear, and Mr. Justice Black makes the same point elsewhere, and I quote:

> "Since we think it important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances, we granted certiorari."

The important thing in that sentence, your Honor, is Mr. Justice Black's reference to the findings on conflicting evidence, and that is exactly the situation you have in most all of the cases which deal with conflicting evidence either on affidavits or after hearing for the taking of evidence, and the cases set forth the rules, and customarily the trial courts are sustained in denying those motions where the evidence is conflicting.

In this case I submit, your Honor, as far as this man Gardner was concerned, as far as his credibility is concerned, we are not dealing with conflicting evidence. We may be if your Honor orders a hearing and we get him back [fol. 41] on the witness stand and we get the FBI agents and the Government attorneys on the witness stand and then we may be dealing with conflicting evidence; but, as this record stands now there is no controversy about these facts relating to the credibility of this man derived from this newly discovered evidence.

If I followed Mr. Kelley's argument correctly, if I didn't misread the Government's memorandum, it is an argument in confession and avoidance. It is an argument in confession and avoidance, because they can't possibly stand up here and say to this Court, "We are convinced this man is not a liar; we are convinced that this man has told the truth; we are convinced this man is worthy of credence."

As I said, as far as we can tell whenever we deal with anything which is subject to objective verification in the case of this man, he never tells the truth, and I submit that a conviction secured on the testimony of a man like that should not be permitted to stand.

(Pages 1-A through 21-A, inclusive, follow.)

Reporter's Certificate

I, Keith B. Watson, Official Court Reporter, do hereby certify that the foregoing pages, numbered 1 through 54, constitute a true, complete and correct transcript of my stenograph notes of the proceedings had in the foregoing case on October 31, 1958.

Keith B. Watson, Official Court Reporter.

(Argument by counsel for both sides was presented.)

STATEMENT BY THE COURT

The Court: Several days ago when this motion was set down for hearing by the Court, Mr. Witt and Mr. Deikman were kind enough to furnish the Court a list of the cases upon which they relied in support of their motion. In the intervening period the Court has examined all of these cases on the list submitted by counsel for defendant and has read with great care practically all of the cases that have been cited, and has itself made a memorandum relating to what each of these cases hold. So with this study that I have made already, which normally could not [fol. 42] have been done until after the arguments, I am satisfied in my own mind as to the disposition of this case or of this motion for a new trial and in the alternative for a hearing on the motion.

Now, I think the first thing that must be examined is exactly what the basis of the motion is. As I understand the motion as counsel have mentioned it here in the argument, the only inconsistency in Gardner's testimony in the trial of the Travis case here was that it said that he misstated his age. He testified in this trial, according to the

motion, that he was born in 1906, while the defense says that in a letter from Mr. Yeagley, acting Assistant Attorney General, dated October 8th, 1958, that the Army records show he was born on October 13, 1903; therefore, they say there is an inconsistency in that testimony.

Now, the only other thing that is said is that in the West case he denied—without quibbling about the form of the question—that he had been in military service. The defense says that this letter that I have just referred to shows that he was in the service of the United States, in the Army, and also goes on further to say that he was a deserter; and they said, of course, that if his answer had been that he had served in the armed forces, I presume the next question would have been about this desertion. In the West case, all it said he did by way of inconsistency in his testimony was to say that he denied he was in the military service, whereas the defense says in truth and in fact he was in the military service.

The only other thing pointed out as a basis for a new trial has to do with these FBI reports which were furnished to the defendant pursuant to Section 3500 of Title 18, which, of course, were not introduced in evidence, as I understand it, at this particular portion of the trial, but were furnished to the defense on their motion in connection with the Jencks case and Section 3500, and it said in that regard that the statements to the FBI were untrue in that therein he stated he was born on July the 13th, 1906, which was consistent with his testimony at the trial, and that he had no military service; that he had been employed by duPont Chemical of Niagara Falls, New York from 1925 to 1929, and that he resided in Niagara Falls, New York from 1925 to 1929. Now, they say that inferentially the information contained in the letter from the acting Assistant Attorney General would show that those statements were untrue, either in whole or in part, these statements made in the FBI report, which I repeat, were not involved in the evidence at the trial at all.

[fol. 43] The period of his employment, I might say, is only partially in issue, because under the submission that Mr. Witt made this morning, a portion of this period he testified to was covered; it is a fringe area before 1926

and after 1928, I think, that is involved. Be that as it may, those are the charges that are made in this motion for a new trial.

Now, this motion is unique in one respect, I think, from many I have observed personally or any I run across in any of the cases I have examined in that it is not supported by any affidavit at all; and by the same token, there is no counteraffidavit from the Government with respect to any of these matters herein contained. The Court could not possibly tell from the matter as it stands what the true date of birth of Mr. Gardner was: He said it was 1906 at the trial, and Mr. Yeagley says the military records show that it was 1903. Neither one of those statements possibly would establish what the ultimate fact was, or would be competent to do that. That is a matter that is not determined, cannot be determined on the face of these pleadings; but, of course, the defense is assuming that this letter of Mr. Yeagley does state the truth, and are saying therefore that these other statements are untrue.

Now, I am going to assume in my consideration of the motion that the defense is right in their contention that there was an inconsistency shown; I will assume that. It is not established as a fact. The motion on its face shows that there is an inconsistency between the date of Mr. Gardner's birth and with reference to his employment and with reference to his military service. Now, assuming again that the defense's contention in these matters is correct, we are confronted with the problem of whether that situation would bring this case within the purview of the tainted testimony rule that led to the dispositions in the Communist Party case and in the Mesarosh case that counsel have referred to a good many times in their arguments.

Now, in the Communist Party case I think it was conceded that the testimony of the witnesses involved, which was a matter of investigation, or not investigation, but which was the basis for the rehearing desired by the Communist Party before the Board, was perjurious in its nature. I think the Court stresses that, that there was no controversy about that. Now, in the Mesarosh case counsel here had some difference of opinion about exactly the

[fol. 44] scope or what the factual situation was in the Mesarosh case. In making my memorandum I have before me a copy of the transcript of the headnote prepared by the Supreme Court in that case, which says:

> "In a Federal District Court, petitioners were convicted of conspiring to violate the Smith Act by advocating the overthrow of the Government of the United States by force and violence. The Court of Appeals affirmed. While a review was pending in this Court, the Solicitor General moved that the case be remanded to the District Court for a determination as to the credibility of the testimony of one of the government witnesses at the trial. He stated that the Government believes that the testimony of this witness at the trial 'was entirely truthful and credible,' but that, on the basis of information in its possession, the Government now has serious reason to doubt the truthfulness of testimony given by the same witness in other proceedings. Parts of the testimony of this witness in other proceedings were positively established as untrue, and the Solicitor General stated on the argument that he believed other parts to be untrue. Petitioners moved that the case be remanded to the District Court for a new trial. Held: Solely on the basis of the Government's representations in its written motion and the statements of the Solicitor General during the argument on the motions, and without reaching any other issue, the Government's motion is denied, the judgment is reversed, and the case is remanded to the District Court with instructions to grant petitioners a new trial."

Now, a mere reading of what happened in the Mesarosh case goes a long way toward distinguishing that factual situation from what we are confronted with here in the case at bar. I think the same may be said of the Communist Party case. There we had a situation where the testimony of a witness was tainted with respect not only to collateral subjects, as we have here, but to the matter of the real issue, the material issue in the case, with respect to the guilt or innocence of the defendant. I will illus-

trate what I mean. If in this case the testimony challenged went to a material issue in the case, we would be confronted by an entirely different situation; but, here the challenged testimony is collateral to any issue in the case. It doesn't have any bearing whatsoever upon the question of the guilt or innocence of the defendant. It simply is a matter that under the law may be considered by the jury in determining what credibility to attach to the witness. [fol. 45] Now, I think the Chief Justice in this case, in the Mesarosh case, said what the rule is that must be applied here. This part of the opinion I think was read by Mr. Kelley a moment ago. In the opinion in the Mesarosh case the Chief Justice said:

> "It must be remembered that we are dealing here with a motion for a new trial initiated by the defense, under Rule 33 of the Federal Rules of Criminal Procedure, presenting untruthful statements by a Government witness subsequent to the trial as newly discovered evidence affecting his credibility at the trial. Such an allegation by the defense ordinarily will not support a motion for a new trial, because new evidence which is 'merely cumulative or impeaching' is not, according to the often-repeated statement of the courts, an adequate basis for the granting of a new trial."

So here it seems to me that all we have, in effect, assuming for the purpose of this consideration the truth of the allegations about these specific matters that I have mentioned in the motion for new trial, is an attempt or is a showing of inconsistent statements that would go to the credibility of the witness by way of impeachment, and I think there are many cases; there were a number cited in the footnote, and I think the almost universal rule is that a motion for new trial upon the ground of newly discovered evidence cannot be granted on the basis of cumulative evidence or evidence that is merely impeaching in its character; and I think that is the nature of these alleged inconsistencies in the testimony of the witness Gardner.

Now, I have searched in vain through these cases cited by counsel for the defense for any case in which there was

a new trial granted for what amounted to collateral impeaching testimony. I could go down the line, but I don't think there is a necessity for it. In every one of them we had a situation where the testimony, the truthfulness—not of the witness, but the truthfulness of the testimony itself on a material issue relating to the guilt or innocence of the defendant was involved.

A very typical case that will illustrate what I am saying is a case which Mr. Witt mentioned in his argument, which is the latest decision of the Supreme Court on the matter, is Alcorta vs. Texas, in 355 U.S. at 28, which is not yet in a [fol. 46] bound volume; it is still on the Supreme Court advance sheets.

In that case under the laws of Texas they have a degree of homicide known as murder without malice, and the test roughly, without being too accurate possibly, is whether the homicide was committed in the heat of passion or violence. This man claimed that he came upon his wife, and the witness so testified at the trial, and this man kissing each other, and that he then killed his wife. As a result of that state of mind that he was in, excited and upset, he contended that he should have been convicted of murder without malice, and not first degree, as the jury found.

It developed that this witness later on retracted his statement and admitted—he testified at the trial he only had had a casual relationship with the wife. He afterwards retracted that testimony and admitted of an intimate relationship with the wife, admitted that they had been out together many times, and things of that sort. It also appeared that he had told the prosecutor of this before he testified at the trial, and the prosecutor had told him he needn't mention it unless he was asked directly the question about it, which didn't happen.

The court in that case, the Supreme Court of the United States in 355 U.S., said that he should have had a new trial, because this evidence, the untruthful evidence, not some collateral matter, related directly to the defense of the defendant. The Court said:

> "If Castilleja's relationship with petitioner's wife had been truthfully portrayed to the jury, it would have, apart from impeaching his credibility, tended to

corroborate petitioner's contention that he had found his wife embracing Castilleja. If petitioner's defense had been accepted by the jury, as it might well have been if Castineja had not been allowed to testify falsely, to the knowledge of the prosecutor, his offense would have been reduced to 'murder without malice' precluding the death penalty now imposed upon him."

If, for example, the witness had merely untruthfully stated his age or employment, or collateral matters of that sort, it is quite obvious that the new trial should not have been granted. It is further to be noted in this case, as I pointed out a moment ago, that the prosecutor knew this testimony at the time the witness testified, which was [fol. 47] an added factor; but, that case is illustrative of the rule I am talking about, and I can believe that if, for instance, in either the Communist Party case or Mesarosh vs. United States case, if the only thing that had been advanced to the Court as a basis for taking the action it did was that these particular witnesses had testified untruthfully as to their age, as to their places of employment, which had no bearing upon any issue, any material issue in the case, or with reference to military service, that we never even would have had an opinion of the Supreme Court on the subject.

Now, there are two other cases that counsel mentioned this morning supporting the view that the motion for new trial might be granted on what I have been calling for convenience collateral impeaching testimony. He mentioned the case of United States vs. Segelman; it is 83 F. Supp. at 890. Now, as I pointed out this morning, in that case I think a reading of the opinion will disclose that the reason a new trial was granted there was that under the circumstances existing at the time of the motion the facts were, as I understand, that in the initial trial the defense had tried to interrogate the witness about whether he had been convicted of perjury. The fact was he had been convicted in the trial court, but had an appeal pending, and the Court sustained the objection, and then after the conviction, before the motion for new trial, the appellate court had affirmed the conviction, and he stood

convicted of perjury, and he came in and asked for a new trial on that basis. The perjury, as far as it appears, was on a collateral subject, and to that extent it might to some degree support the contention of the defense in this case; but, when we go further in the case we find at least in the Court's opinion the reason the new trial was granted, since the witness had been convicted of perjury the Court concluded that the trial court had the duty to instruct the jury that the testimony of such witness must be scrutinized with the greatest of care.

There was some discussion, as counsel know if they read the case, about whether the laws of Pennsylvania or the Federal Rule applied; but, that was the Court's conclusion, and, of course, short of a conviction for something, in this very case if a new trial was had, all the Court could give with respect to the testimony of the witness Gardner would be the ordinary instruction on credibility, which was given in the trial recently completed, so I think that does not support that general proposition.

[fol. 48] The other case that counsel mentioned this morning is United States vs. Senft. In that case a man had been convicted, the defendant had been convicted of the crime of bribing a man named Daly, who was an officer of the United States, and after the completion of the trial and before sentence was imposed Daly was indicted and convicted on the charge of extortion, and the defendant moved for a new trial on this basis, and the new trial was granted. The Court said in the opinion:

> "This presents squarely the question whether the court should grant the motion on the ground that no defendant should be convicted largely upon the testimony of a man who had then actually committed the very crime (even though it could not have been proved at the trial) which it was claimed he had committed in the case at bar, for Senft testified that Daly had tried to extort money from him shortly after he placed him under arrest.
>
> "Without Daly's testimony, or with him at the trial as a witness discredited by his conviction, it may be well doubted whether the jury would find a verdict of guilty."

Now, this statement to me clearly distinguishes the factual situation from that attending at the case at bar. There the defendant had been convicted largely on the testimony of a man who had actually committed the very crime of which the defendant was found guilty, and which the defendant claimed the witness had committed in the case which had been tried, and the situation here, of course, does not parallel that.

I think I could continue with those cases, but I am satisfied from my study of all the cases that the rule I have stated is correct and that this testimony here, judged by the motion itself, admitting for the purposes of this determination as the truth, amounts to no more than impeaching testimony, and under the pronouncement of the Supreme Court in the Mesarosh case itself could not form the basis for the granting of a motion for a new trial.

Now, of course, with that disposed of on the face of the motion there can be no basis for any hearing, because the hearing would have to naturally be limited to the specific charges of untruthful statements made during the trial or in this other case some of the authorities have, I think Mesarosh and the Communist Party both do recognize that [fol. 49] considerations may be given to testimony in other cases, but there is no purpose, it seems to me, on the face of the thing for any hearing, and, of course, there is no basis whatsoever, there being nothing shown by the motion to place the testimony in the tainted class denounced in the Mesarosh case and the Communist Party case that would require the Government to make any statement with respect to whether they knew the fact or whether they didn't, because I don't think the testimony comes in that category.

Ruling of the Court

My conclusion is—as is evident from what I have said—that the motion for new trial, or in the alternative for hearing on the motion, will both be denied, and the Government may draw an appropriate order.

COLLOQUY

Mr. Witt: Will your Honor bear with me for half a moment?

The Court: Yes.

Mr. Witt: I didn't realize your Honor might pass on the motion this afternoon from the bench; but, I would like to make this suggestion to your Honor. I made a check day before yesterday while I was still in the office as to the status of the new trial motion under Rule 33 in the West case. Perhaps Mr. Kelley knows more than I do, but I was informed by one of the attorneys for the defense that the District Court in Ohio had not yet acted on that.

The Court: That would make no difference in the Court's conclusion here at all.

Mr. Witt: May I make my point, if the Court please?

The Court: Yes, I thought you were just informing me—

Mr. Witt: I am not suggesting that your Honor see what the District Court in Ohio does, but we may be faced with this problem: It may well be that the District Court in Ohio will grant that motion on the face of it, or may order a hearing and then grant the motion after a hearing. If that comes about we will have a new situation here perhaps—

The Court: I don't think so. I am giving my decision [fol. 50] on the motion independent of that motion, and I can't think of anything that would happen in that connection that would change my views on this motion.

Mr. Witt: I don't care to argue any further, but I was about to say, as I read the rules if we think something would happen there that would affect this case it is open to us to come in with a new motion under Rule 33.

The Court: I don't know; I wouldn't want to pass on that.

Mr. Witt: I am not asking your Honor to pass on it. All I wanted to do was try to get my point across to your Honor, if I could, and that was to suggest that your Honor perhaps not decide this motion until they see where they stand in the West case, so that we won't have to be coming in here perhaps with another motion.

The Court: Perhaps the same argument might be made in the West case, that they wait until this motion is decided. The order can be made right today, and, of course, if Mr. Witt has a right to make another motion under the rules he may do that; but, as far as this order is concerned, you may draw that now, Mr. Kelley.

Mr. Witt: One other point, for the sake of the record. In view of the fact that your Honor made reference to the circumstance that no supporting affidavit was filed with this motion, I want to point out, as I think I pointed out in chambers when we had an informal conference after the motion was filed, that there seemed to be nothing in the motion that called for an affidavit from counsel or from anybody else, because the facts were not in dispute; the basic fact situation derived from a letter from an acting Assistant Attorney General, and as I read—I think it is Rule 47, I am not sure—affidavits in support of a motion of this kind aren't required, although I, of course, agree that they are filed in most cases.

The Court: As the Court tried to make very clear in announcing its views on the motion, I have proceeded on the assumption that the statements you make about this inconsistent testimony, both here and in the West case, with respect to Gardner's residence, his age, and these matters of employment, was as you stated in your motion. I have assumed that.

[fol. 51] Mr. Witt: Thank you, sir.

The Court: The reason I commented on the affidavit matter, the lack of affidavit, was because—as I think you would be the first to concede—no one could say on the face of this record now which record is true.

Mr. Witt: I commented on that this morning.

The Court: I commented on that because in these other cases, practically all of them, affidavits were filed, and, of course, the thing I didn't mention that you also are well aware of, that in connection with the cases I have mentioned and a number of others cited, we had a number of cases in which there had been a retraction and a recantation of evidence by some witness, which naturally would present an entirely different situation here, because there the Court would be confronted with determining whether

the retraction was correct or the original testimony was correct, as you know.

Mr. Witt: Thank you very much, sir.

If the Court please, we ask that the two letters that I referred to in my argument, the one from duPont, Niagara Falls, and the other from the Morrisania hospital, be filed and made part of the record on the motion for new trial under Rule 33.

The Court: On the basis of my recollection I think I said at the time that this duPont letter might be filed and placed in the record, and, of course, incorporated in the record on this motion.

Now, I see no objection to treating the other one the same way. I think I commented when it was offered or when it was mentioned that I thought it went beyond the scope of the motion, but I see no objection to allowing it to be filed and incorporated in the motion. Do you have any objection?

Mr. Kelley: No, I think the two exhibits or papers and the statement of the Government should all be part of the file.

The Court: I think they are all in the same category, and I think I said it could be filed. In fact, I think I handed it to the Clerk, so you can mark it "filed" and keep it in the record.

[fol. 52] Mr. Witt: I wonder how you will be referring to them for purposes of appeal. Should they be called exhibits to the motion?

The Court: I think you should refer to them as what they are.

(Proceedings adjourned.)

Filed Dec. 5, 1958.

Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 53] CAPTION

Pleas and proceedings in the United States Court of Appeals for the Tenth Circuit at the January Term and March Term, 1959, of said court.

Before Honorable Sam G. Bratton, Chief Judge, and Honorable Alfred P. Murrah and Honorable David T. Lewis, Circuit Judges.

On the 17th day of December, A. D. 1958, a transcript of the record, pursuant to a notice of appeal, filed in the United States District Court for the District of Colorado, was filed in the office of the clerk of the United States Court of Appeals for the Tenth Circuit, in a certain cause wherein Maurice E. Travis was appellant, and United States of America was appellee, which said transcript, as prepared and reproduced under the rules of the United States Court of Appeals for the Tenth Circuit, is in the words and figures following:

[fol. 54] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

MOTION TO REMAND CASE TO THE DISTRICT COURT, OR, IN THE ALTERNATIVE, FOR AN EXTENSION OF TIME FOR FILING BRIEF —Filed January 13, 1959

Appellant, by his attorney, moves that the case be remanded to the District Court, or, in the alternative, that the time for filing appellant's brief be extended to February 20, 1959. In support thereof, appellant shows:

1. This is an appeal from an order of the District Court for the District of Colorado denying a motion, under Rule 33 of the Federal Rules of Criminal Procedure, for a new trial, or, in the alternative, for a hearing, based on newly discovered evidence. Appellant's brief is required to be filed on or before January 22, 1959.

2. The appeal from the conviction herein (No. 5879) is pending decision by this Court, after argument on November 17, 1958.

3. The newly discovered evidence on which the motion for a new trial was based consists of evidence that Fred L. Gardner, one of the three prosecution witnesses, had deserted from the Armed Forces in 1926; had lied about that and other matters in giving information to the F.B.I., which in turn was furnished to appellant, pursuant to Title 18, U.S.C., Section 3500, on the trial herein; and had committed perjury in his testimony on the trial herein and on the trial in *U.S. v. West et al.* in the United States District Court for the Northern District of Ohio, Eastern Division, Criminal No. 22230.

4. A hearing on a motion for a new trial in the *West case* on similar grounds as the motion herein was conducted by said District Court from December 15 to December 18, 1958, and ruling thereon is pending. The stenographic record of said hearing has not yet been transcribed, but the undersigned attorney for appellant [fol. 55] has been advised by the attorneys for defendants in the *West case* that the evidence received in the course of said hearing proves that Gardner lied to the F.B.I. and perjured himself on the trial herein and on the trial in the *West case* with respect to matters in addition to those set forth in the motion for a new trial herein. Appellant desires to bring such additional matters to the attention of the District Court for reconsideration of the motion for a new trial and then to have them incorporated in the record on this appeal in the event that the District Court reaffirms the denial of the motion.

5. Without a copy of the typewritten transcript of the proceedings on the hearing in the *West case*, appellant is in no position to take further steps in the District Court. The attorney for appellant has given the Official Court Reporter in the United States District Court for the Northern District of Ohio an order for a copy of said transcript, but the Reporter advises that, because of the press of other matters in said District Court, said transcript will not be available until some time in February, 1959. As soon as possible after said transcript is available to attorney for the appellant and if this Court remands the

case to the District Court, appellant will move the District Court for a reconsideration of the order denying the motion for a new trial.

6. Unless this Court remands the case, it will be necessary for appellant to file a second motion for a new trial, with the result that there will be two separate appeals on two separate records if the District Court also denies the second motion. A remand of the case will avoid additional expense to the parties and will make it more convenient for this Court to consider the entire matter more expeditiously on one record on one appeal instead of on two [fol. 56] records on two appeals. On the other hand, if, upon reconsideration, the District Court grants the motion for a new trial, it will be unnecessary for this Court to decide even the instant appeal.

7. In the event that this Court denies the foregoing motion to remand, appellant moves that the time for filing his brief be extended to February 20, 1959. Appellant's attorney is leaving his office in New York City on January 13, 1959, for a trip to several cities in the West on necessary personal and professional engagements and will not return to his office until early in the week of February 9. An extension of time for filing the brief to February 20 will not delay the eventual disposition of the entire matter since, if this Court denies the motion to remand, appellant will, as set forth above, file a second motion for a new trial.

Wherefore, appellant moves that the Court remand the case to the District Court, or, in the alternative, that the time for filing appellant's brief be extended to February 20, 1959.

Respectfully submitted,

Nathan Witt, Post Office Box 150, New York 23, New York, Attorney for Appellant.

[fol. 57]

IN UNITED STATES COURT OF APPEALS

ORDER DENYING MOTION TO REMAND AND GRANTING MOTION TO EXTEND TIME FOR FILING APPELLANT'S BRIEF —January 13th, 1959

Before Honorable Sam G. Bratton, Chief Judge.

This cause came on to be heard on the motion of appellant to remand this cause to the United States District Court for the District of Colorado, or, in the alternative, for an extension of time for filing appellant's brief.

On consideration whereof, it is now here ordered that the said motion to remand be and the same is hereby denied.

It is further ordered that the time for the serving and filing of appellant's brief be and the same is hereby extended to and including February 10, 1959.

[fol. 58] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—March 26, 1959 (omitted in printing).

[fol. 59]

IN UNITED STATES COURT OF APPEALS

JUDGMENT—March 27, 1959

Before Honorable Sam G. Bratton, Chief Judge, and Honorable Alfred P. Murrah and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed, without written opinion.

[fol. 60] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 61]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1958

MAURICE E. TRAVIS, Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—April 4, 1959

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 26th, 1959.

Charles E. Whittaker, Associate Justice of the Supreme Court of the United States.

Dated this 4th day of April, 1959.

[fol. 62]

SUPREME COURT OF THE UNITED STATES

No. 75, October Term, 1959

MAURICE E. TRAVIS, Petitioner,

vs.

UNITED STATES

ORDER ALLOWING CERTIORARI—May 31, 1960.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is consolidated with Nos. 479 and 872 and a total of three hours is allowed for argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.